A. The Court of Appeals' Holding Impairs The Prosecution of Crimes, A Core Executive Function

The enforcement of the criminal law is one of the fundamental ways in which the executive branches of federal and state governments exercise the power vested in them by their respective constitutions. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). As the Court has stated, the decision to prosecute "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Heckler*, 470 U.S. at 832 (quoting U.S. Const. art. II, § 3).

The Court has accordingly recognized that prosecutors have "'broad discretion'" in enforcing the criminal law. *Armstrong*, 517 U.S. at 464 (citations omitted). A "'presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *Id.* (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). Thus, "'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *Id.* (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

Judicial reluctance to review prosecutorial decisionmaking is grounded in the courts' lack of competence to scrutinize prosecutorial decisions. Indeed, this Court has acknowledged that "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to

undertake.'" *Id.* at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).[2] As the National District Attorneys Association has explained:

> The exercise of prosecutorial discretion in the screening, charging, and diversion decisions are not only integral parts of the American criminal justice system but are also *the most important aspect of the prosecutorial function* . . . . Such discretionary action is induced by scarcity of investigative and prosecutorial resources, by legislative over-generalization, and by low enforcement priority of some violations.

National District Attorneys Association, *National Prosecution Standards* 127 (2d ed. 1991) (emphasis added).

It is also based on the recognition that judicial scrutiny of prosecutorial decisionmaking would unduly intrude on a core function which the Constitution vests in a coordinate branch of government. "'Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement

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[2] Prosecutors may consider numerous factors in deciding whether to charge. These include "[t]he probability of conviction," "[t]he nature of the offense," "[t]he characteristics of the offenders," "[p]ossible deterrent value of prosecution to the offender and society in general," "[l]ikelihood of prosecution by another criminal justice authority," "[t]he willingness of the offender to cooperate with law enforcement," "[a]id to other criminal justice goals through non-prosecution," "[t]he interests of the victim," "[p]ossible improper motives of a victim or witness," "[t]he availability of adequate civil remedies," "[t]he age of the offense," "[u]ndue hardship caused to the accused," "[a] history of non-enforcement of a statute," "[e]xcessive cost of prosecution in relation to the seriousness of the offense," "[r]ecommendations of the involved law enforcement agency," and "[a]ny mitigating circumstances." National District Attorneys Association, *National Prosecution Standards* 130-31 (2d ed. 1991) (Std. 43.6).

policy.'" *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 607).

True enough, the Court has recognized that "a prosecutor's discretion is 'subject to constitutional constraints.'" *Id.* at 464 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)). A prosecutorial decision thus "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Nor can a charge be filed solely because a person "non-provocatively voic[ed]" his objection to a police officer's conduct. *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (per curiam). The Court, however, has never held that a First Amendment retaliatory prosecution claim can be maintained when probable cause supported the criminal charges.

While the court of appeals asserted that its approach "comports with [this Court's] framework in *Mt. Healthy*," Pet. App. 15a, that case does not support the holding below. *Mt. Healthy* involved a claim that a school board had failed to renew a teacher's contract because of the teacher's protected speech. *See* 429 U.S. at 281-82. There was no dispute that the decision was based on the teacher's protected conduct as the board's termination statement expressly referenced his speech. *Id.* at 282-84 & n.1. *Mt. Healthy* thus does no more than set forth a "rule of causation," *id.* at 285, under which an employee must first "show that his conduct was constitutionally protected, and that this conduct . . . was a 'motivating factor' in the Board's decision not to rehire him." *Id.* at 287 (footnote omitted). Only after the employee made this showing was the Board required to prove "that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* As *Mt. Healthy* explains, while vindicating the constitutional principle is important, "an employee [should not be placed] in a better position as a result of the exercise of constitutionally

protected conduct than he would have occupied had he done nothing." *Id.* at 285.

Most significantly, *Mt. Healthy* did not establish a broad rule applicable to all First Amendment claims. Indeed, *Mt. Healthy* made clear that its rule is context specific. *See id.* at 287 ("the proper test to apply in *the present context* is one which . . . protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights") (emphasis added). Beyond the fact that the *Mt. Healthy* rule was articulated where it was undisputed that protected conduct played a substantial part in the decision not to renew the teacher's contract, the differences between prosecutorial and employment decisionmaking are so deep and fundamental as to render *Mt. Healthy* inapplicable in cases that involve the exercise of prosecutorial discretion.

While public education is an important governmental function, it is typically not carried out by constitutional officers (and their appointees) such as prosecutors, who are vested with extraordinary discretion in deciding how to perform their duties. *See* pp. 7-9 *supra*. While the court of appeals purported to acknowledge that "the criminal context . . . involves considerations of prosecutorial discretion absent in a school employment decision," Pet. App.16a, the court did no more than pay lip service to the principle. As this case demonstrates, adoption of the lower court's holding would result in intrusive judicial scrutiny of decisionmaking which the Federal Constitution commits to a coordinate branch of government. *See Heckler*, 470 U.S. at 832.

Here, for example, the court of appeals held that respondent had stated a violation of the First Amendment based in part on evidence that "the U.S. Attorney's Office warned that the case would be 'complicated' and 'consume significant resources'—considerations that, under normal circum-

stances, might weigh against prosecuting a marginal case."[3] Pet. App. 28a. The court further reasoned that "this combination of factors—complexity and expense plus strong indications of retaliation and weak evidence of probable cause—suggests not only that hostility to free expression was at least a motivating factor in Moore's prosecution, but also that the inspectors may be unable to rebut that inference." *Id.*

The court's approach is problematic for several reasons. First, it is altogether unclear why the conclusions of the senior *prosecutors* that the case was "complicated" and would "consume significant resources," *id.*, are probative of the *inspectors*' hostility to Moore's First Amendment rights. Second, if a retaliatory prosecution claim can be brought even when there is probable cause to support the prosecution, it is likely that the internal deliberations of the prosecutor's office will be subject to judicial scrutiny as occurred here. Such materials as the internal memoranda (which were quoted by the court of appeals) might be subject to discovery; and even if that were not so, the prosecutor's office might feel compelled to submit such documents either because of external pressure or to support a summary judgment motion filed on behalf of the defendants. Indeed, prosecutors might themselves be subject to depositions inquiring into their reasons for bringing a case, thus distracting them from their duties and interfering with the exercise of their professional judgment.

It is difficult to understand how the interests of justice are served by rule which invites judicial inquiry into prosecutorial decisionmaking. Especially in complex criminal cases such as this one, a frank discussion of such factors as

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[3] The court of appeals' assertion that "[t]he U.S. Attorney's Office warned that the case would be 'complicated,' and 'consume significant resources,'" Pet. App. 28a, misstates the record. While that was the conclusion of two officials in the office, *see id.* at 26a, obviously others in the office believed that the case warranted prosecution.

the strength and weaknesses of the government's evidence, as well as the costs and benefits of bringing the case, is absolutely essential to the proper exercise of prosecutorial discretion. Whether such materials as the memos are discoverable (as they may become if this Court adopts the holding below) or voluntarily offered by the government in defense of itself or its officials, the consequence of the court of appeals' holding will be the same—to chill candid discussion of such cases by reviewing personnel in the prosecutor's office.

Beyond that, it is not a proper concern of the courts that a prosecution is "complicated" or will "consume significant resources." *Id.* White collar criminal cases, especially those involving public corruption, typically are complicated and consume significant resources. Whether such cases merit prosecution is a determination which is the Executive Branch's to make in light of its enforcement priorities. The holding of the court of appeals will thus result in repeated and unwarranted judicial intrusions into the internal deliberations of the Executive Branch, a development which violates separation of powers principles because it "interfer[es] with a coequal branch's ability to discharge its constitutional responsibilities."[4] *Cheney v. District Court*, 124 S.Ct. 2576, 2588 (2004). As the Court has recognized, "[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (internal quotations and

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[4] While this case involves the relationship between branches of the Federal Government, the holding below raises equally troublesome questions regarding federal-state relations. *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government, anxious though it may be to vindicate federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.").

citations omitted). *See also Armstrong*, 517 U.S. at 465 (judicial reluctance to review prosecutorial decisionmaking "stems from a concern not to unnecessarily impair the performance of a core executive constitutional function"). These principles require reversal of the judgment below.

B. Probable Cause And The Procedures Of Criminal Law Provide Adequate Protection Against Retaliatory Prosecutions

The court of appeals held that "damages liability [exists] for prosecutions that would not have occurred without retaliatory motive, even if the officers involved acted on the basis of probable cause." Pet. App. 19a. The court explained that "[t]his theory of liability . . . is limited," because the existence of probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent." *Id.* The court nonetheless held that "[a] *Bivens* recovery remains possible . . . in those rare cases where strong motive evidence combines with *weak probable cause* to support a finding that the prosecution would not have occurred but for the officials' retaliatory animus." *Id.* at 19a-20a (emphasis added).

In contrast to a test that inquires into the existence *vel non* of probable cause, the court's rule is inherently subjective and unworkable. The court did not explain what constitutes "weak probable cause" or "quite weak indicators of probable cause," *id.*, so that a trial court could apply these amorphous standards in future cases. Nor did the court explain why the long-existing, objective probable cause standard as articulated by this Court in numerous cases is inadequate to protect against abusive prosecutions. *See Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (discussing the "long-prevailing standards" of probable cause).

The court of appeal's "know it when [we] see it approach," *cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J.,

concurring), likewise offers no guidance to law enforcement officers who, having found evidence of a crime committed by someone who engaged in protected activity, must determine whether to pursue a criminal prosecution.[5] Knowing that they can be held liable if a subsequent criminal prosecution fails notwithstanding the existence of probable cause, criminal investigators will refrain from forwarding cases to prosecutors, thereby undermining public policy that those suspected of criminal activity be prosecuted.

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[5] The court's conclusion that there was "weak probable cause," Pet. App. 20a, is based on a mischaracterization of the record. According to the court, it was "the opinion of the Chief and Deputy Chief of Special Prosecutions . . . that the evidence was 'questionable.'" *Id.* at 27a. In fact, these two senior prosecutors had concluded "that 'there is enough evidence to get by'" a motion for judgment of acquittal. *Id.* at 26a (quoting memorandum of Chief and Deputy Chief of Special Prosecutions to U.S. Attorney). What was "questionable" in the view of these officials was "the chances of convicting Moore, Reedy, and REI." *Id.* That conclusion was hardly surprising given that the case alleged a conspiracy, was factually complex, and was based entirely on circumstantial evidence. *Id.*

The senior prosecutors' conclusion that there was enough evidence to defeat a motion for judgment of acquittal does not support the court's view that there was weak probable cause. A motion for judgment of acquittal requires a trial court to determine whether "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt." *Burks v. United States*, 437 U.S. 1, 16 (1978) (collecting cases and other authorities). This standard is plainly more exacting than that of probable cause, which requires a reasonable objective basis to believe that a suspect has committed a crime and can be based on evidence (such as hearsay) which is not admissible in court. *See, e.g., Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 120-21 (1975); *Bostic v. City of Chicago*, 981 F.2d 965, 968-69 (7th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993). Thus, if in the view of two senior officials, the government's case was strong enough to defeat a motion for a judgment of acquittal, the evidence well exceeded the standard of probable cause.

Probable cause has long been the standard applied by the courts to assess whether a person has been subjected to an unwarranted criminal prosecution. *See Brinegar*, 338 U.S. at 175-76. As the Court explained in *Brinegar*, this "long-prevailing standard[] . . . safeguard[s] citizens from . . . unfounded charges of crime." *Id.* at 176. Thus, the grand jury's responsibilities "include . . . the determination whether there is probable cause to believe a crime has been committed." *United States v. Calandra*, 414 U.S. 338, 343 (1974) (citing *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1974)).[6] Correspondingly, "the prosecutor has a professional duty not to charge a suspect with crime unless he is satisfied [as to the existence] of probable cause." *Gerstein*, 420 U.S. at 121 n.22 (collecting authorities).

Thus, while the common law recognizes a cause of action for malicious prosecution, it has always required that the plaintiff prove not only that "the charge was made maliciously," but that it was also made "without probable cause."

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[6] This case involved the additional protection of indictment by a grand jury. Pet. 6. For centuries the grand jury has served the vital function of protecting the accused from malicious and oppressive criminal prosecutions. *See Wood v. Georgia*, 370 U.S. 375, 390 (1962). As the Court explained in *Wood*:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Id. See also Calandra, 414 U.S. at 343 ("The scope of the grand jury's powers reflects its special role in insuring fair and effective law enforcement.").

Munns v. De Mours, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811). As a leading authority explains, this cause of action

> has never been regarded with any favor by the courts, and it is hedged with restrictions which make it very difficult to maintain. Chief among these is the requirement that the plaintiff must sustain the burden of proof that the criminal proceeding was initiated or continued by the defendant without 'probable cause.' This is true even though the defendant is found to have acted with 'malice,' for an improper purpose, since it is the part of a good citizen to bring about the prosecution of those who are reasonably suspected of crime, and the addition of a personal motive should not result in liability for performing a public obligation. The existence of such 'malice' does not create even an inference that probable cause was lacking.

W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984) (footnotes omitted).

Similarly, in defining the elements of the action, the *Restatement* instructs that "[a] private person who intitiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if . . . he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice." 3 *Restatement (Second) of Torts* § 653 (1977). The *Restatement* further explains that "the burden is upon the plaintiff to prove both the absence of probable cause and the improper purpose for which the proceedings were initiated." *Id.* § 652, at 406 (Introductory Note). *See also* Stuart M. Speiser, *et al.*, 8 *The American Law of Torts* § 28.7, at 38 & n.54 (1991) ("[I]t is fundamental that lack or want of probable cause is an essential element for successful pursuance of such an action.") (collecting cases).

Malicious prosecution actions are disfavored because they run "counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged." *Prosser & Keeton*, *supra*, § 119, at 876. As this authority explains: "The law supports the use of litigation as a social means for resolving disputes, and it encourages honest citizens to bring criminals to justice. Consequently the accuser must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability." *Id.* § 119, at 871. The common law also recognizes that "no one should be permitted to subject a fellow citizen to prosecution for an improper purpose and without an honest belief that the accused may be found guilty." *Id.* The probable cause element thus serves the vital purpose of balancing the "[t]he individual interest in freedom from unjustifiable litigation and the social interest in supporting resort to law." *Id.*

This Court has recognized the same principle with respect to constitutional claims. In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court held that the defense of probable cause was available in an action brought under 42 U.S.C. § 1983. *See id.* at 557. The Court explained, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555.

There is a compelling public interest in bringing criminals to justice. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 560-61 (1978) (recognizing "the fundamental public interest in implementing the criminal law"); *see also Prosser & Keeton*, *supra*, § 119, at 876. This interest is not diminished because a suspect has at some point engaged in protected activity. Indeed, in *Pierson*, where the Court first recognized the defense of qualified immunity, the suit sought damages for the unconstitutional arrests of persons who had engaged in

protected activity. *See Pierson*, 386 U.S. at 552-53; *cf. Harlow*, 457 U.S. at 804-05, 807 (recognizing qualified immunity in suit bringing retaliation claim).

The prosecution of many serious and complex crimes, particularly where the defendants are highly visible figures (such as in public and corporate corruption cases) would be especially harmed by a rule which allows a claim of retaliatory prosecution to go forward even when law enforcement officials had probable cause to believe a crime was committed. In many of these cases, an acquitted defendant could easily claim that the prosecution was motivated by a desire to retaliate against him for engaging in protected activity. Indeed, the rule adopted by the court of appeals encourages the pleading of borderline "speech" as "protected" activity in order to support otherwise frivolous claims of retaliatory prosecution.[7] By subjecting law enforcement officials to potential liability for referring a case to the prosecutor, even when probable cause exists, the court of appeals' rule will discourage law enforcement from pursuing the prosecution of serious crimes. It thus undermines the strong public interest in having law enforcement officers present cases of criminal conduct to prosecutors.[8]

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[7] *See, e.g., Smithson v. Aldrich*, 235 F.3d 1058, 1060, 1063 (8th Cir. 2000) (bar owner alleged that police violated First Amendment when they arrested and charged him "not to enforce city's sound ordinance, but because of [the police's] disagreement with his statements to the crowd challenging the decision to stop the music" after 11 p.m. expiration of permit for outdoor concert).

[8] Nor is this concern limited to law enforcement. Any public official could be sued for referring a case to law enforcement officers, notwithstanding the existence of probable cause. *See Mozzochi v. Borden*, 959 F.2d 1174, 1175-80 (2d Cir. 1992) (suit against town manager who reported to police plaintiff's threats of violence).

The assurance of the court below that "[t]his theory of liability . . . is limited" because the existence of probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent," Pet. App. 19a, provides cold comfort to criminal investigators. Under the court's rule, it will no longer be enough for law enforcement officers to have acted in an objectively reasonable manner when they refer a case to the prosecutor's office. *Cf. Devenpeck v. Alford*, 125 S.Ct. 588, 594 (2004) ("Subjective intent of the arresting officer, *however* it is determined . . . is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."). Rather, to avoid liability, criminal investigators will have to demonstrate the existence of some form of heightened probable cause, a concept which has never been recognized by this Court. Nor, as this case illustrates, will it be enough to rely on the judgment of a prosecutor that the evidence is sufficient to support a criminal prosecution.

The court of appeals' rule ignores the respective roles of criminal investigators and prosecutors in investigating cases. Criminal investigators gather evidence; prosecutors decide whether to seek an indictment and whether the evidence is sufficient to support the charge. Indeed, as the internal review conducted by the U.S. Attorney's office demonstrates, the prosecutors exercised independent judgment in deciding to seek Moore's indictment. Prosecutors have a strong interest in ensuring that cases taken to trial are strong enough to obtain a conviction. That Moore's six-week trial did not result in a conviction does not justify subjecting petitioners, who had probable cause, to damages liability. The court of appeals' assertion that "were courts to demand no more than a showing of probable cause . . . law enforcement officers could freely bring marginal cases," Pet. App. 16a, is simply erroneous.[9]

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[9] Mischaracterizing petitioners' argument, the court of appeals further stated: "As the inspectors see it, constitutional free speech protections say

The court of appeals failed to explain why the probable cause requirement—which for centuries has been adequate to protect against unfounded criminal accusations brought for the gamut of malicious motives—does not protect those persons who allege that they were prosecuted because they engaged in protected activity. The court below also ignored the historic and continuing role of the grand jury "in insuring fair and effective law enforcement," *Calandra*, 414 U.S. at 343, and protecting suspects against accusations brought "by malice or personal ill will." *Hale v. Henkel*, 201 U.S. 43, 59 (1906).

According to the court of appeals, its rule "allows the government to proceed with prosecutions that, though motivated in part by hostility to *First Amendment* activity, can be justified on legitimate grounds. When hostility to speech represents a but-for cause of the prosecution, however, the charges are 'deliberately based upon an unjustifiable stan-

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nothing about prosecutions brought only because the defendant is, say, a peace activist, a Klan member, a Democrat, or a Republican." *Id.* at 17a.

Law enforcement officers, however, do not have the final say as to whether a criminal prosecution is commenced—the prosecutor does. Moreover, if probable cause exists, then a prosecution clearly has not been "brought only because the defendant is . . . a Klan member." Indeed, *amici* are mindful of the history of the civil rights struggle and that some Klan members—consistent with the views of the Klan—engaged in criminal activity including lynchings, the murders of civil rights workers and bombing of churches. There were a number of prosecutions of Klan members who committed these acts that did not result in convictions. *See* Howard Ball, *Murder in Mississippi:* United States v. Price *and the Struggle for Civil Rights* 132-34 (2004) (discussing federal trial of eighteen Klan members for conspiracy to violate the civil rights of murdered civil rights workers in Philadelphia, Mississippi, in which only seven defendants were convicted). Under the court of appeals' rule, the acquitted defendants in these cases could have brought retaliatory prosecution claims against the law enforcement officers who investigated the cases notwithstanding the existence of probable cause to believe that the defendants had committed the charged crimes.

dard.'" Pet. App. 17a (quoting *Wayte v. United States*, 470 U.S. at 608.).[10]

This reasoning is flawed. First of all, under the court's rule it is not the government but rather its officials upon whom liability is imposed. Moreover, it is the investigators, who have only qualified immunity, not the prosecutors, who have absolute immunity, who are potentially liable. Furthermore, "hostility to speech" may be "a but-for cause of [a] prosecution" that results in a conviction. But if this is the test for determining whether "the charges are deliberately based upon an unjustifiable standard" that violates the Constitution, it suggests that prosecutions that are motivated by hostility to protected activity but which result in convictions also give rise to civil liability.[11]

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[10] *Amici* have previously shown that *Mt. Healthy* does not support the court of appeals' holding. The court of appeals' holding does not, however, comport with *Mt. Healthy* which requires far more than a showing of "but-for" causation. Rather, the plaintiff must show that his "constitutionally protected" conduct "was a 'motivating factor'" behind the governmental action. 429 U.S. at 287 (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270-71 n.21 (1977)).

[11] The court of appeals maintained that its holding was based on circuit precedent. *See* Pet. App. 12a-16a. (discussing *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. 1987)). The plaintiff in *Haynesworth* "charge[d] that he was victimized by an unmerited prosecution," 820 F.2d at 1255, and that he was arrested without probable cause. *See id.* at n.76. The trial court dismissed the case on a 12(b)(6) motion. *See id.* at 1248. The court of appeals specifically noted that "it may be that there was no good reason for lodging the criminal charge against Haynesworth in the first place," and that "Haynesworth alleged that he was charged with disorderly conduct solely because he refused to release his civil claims against the arresting officers." *Id.* at 1257. Thus, it does not appear that *Haynesworth* raised the issue of whether a lack of probable cause was an element of the claim or whether the existence of probable cause could be raised by the defendants as an affirmative defense.

In a footnote, *Haynesworth* followed *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979), even though *Wilson* "set out the essential elements

The court of appeals was obviously not willing to go that far, presumably because of the compelling societal interest in punishing criminal conduct. *See* Pet. App. 19a (explaining that probable cause "will be enough in most cases to establish that prosecution would have occurred absent bad intent"). This interest, however, exists independently of the outcome of any one prosecution. *See* discussion *supra* at 16-18.

In short, established procedures of the criminal law and the probable cause standard as applied by prosecutors and grand juries have long provided adequate protection against unfounded criminal charges. The court of appeals gave no persuasive explanation why these safeguards do not adequately protect First Amendment rights. This Court should therefore reject the ruling below.

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of a retaliatory-prosecution claim in a § 1983 action *for injunctive relief*." 820 F.2d at 1257 n.93 (emphasis added). As this Court has recognized, suits for money damages against public officers present far different considerations than a suit seeking an injunction.

Significantly, neither the Eleventh nor the Fifth Circuits, the successor courts to the old Fifth Circuit, sustains a retaliatory prosecution claim where the charges are supported by probable cause. *See Keenan v. Tejada*, 290 F.3d 252, 260 (5th Cir. 2002) ("retaliatory criminal prosecutions in violation of the First Amendment are actionable only if a plaintiff can also prove the common-law elements of malicious prosecution, including the absence of probable cause to prosecute"); *Redd v. City of Enterprise*, 140 F.3d 1378, 1383-84 (11th Cir. 1998) (recognizing qualified immunity defense where officers had probable cause to arrest).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HARTMAN ET AL. *v.* MOORE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04–1495. Argued January 10, 2006—Decided April 26, 2006

Seeking to convince the United States Postal Service to incorporate multiline optical scanning technology, a company (REI), which manufactured multiline optical readers, commenced an extensive lobbying and public-relations campaign. In the end, the Postal Service begrudgingly embraced the multiline technology, but awarded the lucrative equipment contract to a competing firm. Subsequently, Postal Service inspectors investigated REI and its chief executive, respondent Moore, for their alleged involvement in a consulting-firm kickback scandal and for their alleged improper role in the search for a new Postmaster General. Urged at least in part by the inspectors to bring criminal charges, a federal prosecutor tried REI and its top officials. But, finding a complete lack of evidence connecting them to any wrongdoing, the District Court acquitted the defendants. Moore then filed an action under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, against the federal prosecutor and petitioner postal inspectors, arguing, as relevant here, that they had engineered the prosecution in retaliation for his lobbying efforts. The claims against the prosecutor were dismissed in accordance with the absolute immunity for prosecutorial judgment. Ultimately, the entire suit was dismissed, but the Court of Appeals reinstated the retaliatory-prosecution claim against the inspectors. Back in District Court, the inspectors moved for summary judgment, claiming that because the underlying criminal charges were supported by probable cause they were entitled to qualified immunity. The District Court denied the motion, and the Court of Appeals affirmed.

Held: A plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges. Pp. 5–15.

Syllabus

(a) As a general matter, this Court has held that the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out. *Crawford-El* v. *Britton*, 523 U. S. 574, 592. When nonretaliatory grounds are insufficient to provoke the adverse consequences, retaliation is subject to recovery as the but-for cause of official injurious action offending the Constitution, see, *e.g.*, *id.*, at 593, and a vengeful federal officer is subject to damages under *Bivens*. Pp. 5–6.

(b) Although a *Bivens* (or 42 U. S. C. §1983) plaintiff must show a causal connection between a defendant's retaliatory animus and subsequent injury in any retaliation action, the need to demonstrate causation in the retaliatory-prosecution context presents an additional difficulty which can be overcome by a showing of the absence of probable cause. In an ordinary retaliation case, the evidence of motive and injury are sufficient for a circumstantial demonstration that the one caused the other, and the causation is understood to be but-for causation, without which the adverse action would not have been taken. When the claimed retaliation is, however, a criminal charge, the action will differ in two ways. First, evidence showing whether there was probable cause for the criminal charge will be highly valuable circumstantial evidence to prove or disprove retaliatory causation. Demonstrating a lack of probable cause will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that the prosecution would have occurred even without a retaliatory motive. Second, since the defendant in a retaliatory-prosecution case will not be the prosecutor, who has immunity, but an official who allegedly influenced the prosecutorial decision, the causal connection required is not between the retaliatory animus of one person and that person's own injurious action, as it is in the ordinary retaliation case, but between the retaliatory animus of one person and the adverse action of another. Because evidence of an inspector's animus does not necessarily show that the inspector induced the prosecutor to act when he would not have pressed charges otherwise and because of the longstanding presumption of regularity accorded prosecutorial decisionmaking, a showing of the absence of probable cause is needed to bridge the gap between the nonprosecuting government agent's retaliatory motive and the prosecutor's injurious action and to rebut the presumption. Pp. 6–13.

(c) The significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value. Though not necessarily dispositive, the absence of probable cause along with a retaliatory motive on the part of the official urging prosecution are reasonable grounds to suspend the presumption of

Syllabus

regularity behind the charging decision and enough for a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to go forward. Pp. 13–15.

388 F. 3d 871, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined. ROBERTS, C. J., and ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1495

MICHAEL HARTMAN, FRANK KORMANN, PIERCE McINTOSH, NORMAN ROBBINS, AND ROBERT EDWARDS, PETITIONERS *v.* WILLIAM G. MOORE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April 26, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

This is a *Bivens* action against criminal investigators for inducing prosecution in retaliation for speech. The question is whether the complaint states an actionable violation of the First Amendment without alleging an absence of probable cause to support the underlying criminal charge. We hold that want of probable cause must be alleged and proven.

I

In the 1980's, respondent William G. Moore, Jr., was the chief executive of Recognition Equipment Inc. (REI), which manufactured a multiline optical character reader for interpreting multiple lines of text. Although REI had received some $50 million from the United States Postal Service to develop this technology for reading and sorting mail, the Postmaster General and other top officials of the Postal Service were urging mailers to use nine-digit zip codes (Zip + 4), which would provide enough routing information on one line of text to allow single-line scanning

machines to sort mail automatically by reading just that line.

Besides Moore, who obviously stood to gain financially from the adoption of multiline technology, some Members of Congress and Government research officers had reservations about the Postal Service's Zip + 4 policy and its [illegible]ded reliance on single-line readers. Critics maligned single-line scanning technology, objected to the foreign sources of single-line scanners, decried the burden of remembering the four extra numbers,[1] and echoed the conclusion reached by the United States Office of Technology Assessment that use of the single-line scanners in preference to multiliners would cost the Postal Service $1 million a day in operational losses.

Moore built on this opposition to Zip + 4, by lobbying Members of Congress, testifying before congressional committees, and supporting a "Buy American" rider to the Postal Service's 1985 appropriations bill. Notwithstanding alleged requests by the Postmaster General to be quiet, REI followed its agenda by hiring a public-relations firm, Gnau and Associates, Inc. (GAI), which one of the Postal Service's governors, Peter Voss, had recommended.

The campaign succeeded, and in July 1985 the Postal Service made what it called a "mid-course correction" and embraced multiline technology. Brief for Respondent 4. But the change of heart did not extend to Moore and REI, for the Service's ensuing order of multiline equipment, valued somewhere between $250 million and $400 million went to a competing firm.

Not only did REI lose out on the contract, but Moore and REI were soon entangled in two investigations by Postal

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[1] See, *e.g.*, Seaberry, Durenberger Begins Campaign Against Nine-Digit Zip Code, Washington Post, Feb. 24, 1981, p. E1 (describing Senator David Durenberger's reference to the Zip + 4 campaign as "'a mnemonic plague of contagious digititous'").

Service inspectors. The first looked into the purported payment of kickbacks by GAI to Governor Voss for Voss's recommendations of GAI's services, as in the case of REI; the second sought to document REI's possibly improper role in the search for a new Postmaster General. Notwithstanding very limited evidence linking Moore and REI to any wrongdoing, an Assistant United States Attorney decided to bring criminal charges against them, and in 1988 the grand jury indicted Moore, REI, and REI's vice president. At the close of the Government's case, after six weeks of trial, however, the District Court concluded that there was a "complete lack of direct evidence" connecting the defendants to any of the criminal wrongdoing alleged, and it granted the REI defendants' motion for judgment of acquittal. *United States* v. *Recognition Equip. Inc.*, 725 F. Supp. 587, 596 (DC 1989).

Moore then brought an action in the Northern District of Texas for civil liability under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971),[2] against the prosecutor and the five postal inspectors who are petitioners here (a sixth having died). His complaint raised five causes of action, only one of which is relevant here, the claim that the prosecutor and the inspectors had engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment. In the course of these proceedings Moore has argued,

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[2] "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson* v. *Green*, 446 U. S. 14, 18 (1980). Though more limited in some respects not relevant here, a *Bivens* action is the federal analog to suits brought against state officials under Rev. Stat. §1979, 42 U. S. C. §1983. See *Wilson* v. *Layne*, 526 U. S. 603, 609 (1999); see also Waxman & Morrison, What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause, 112 Yale L. J. 2195, 2208 (2003) ("Section 1983 applies . . . to state and local officers, [and] the Supreme Court in *Bivens* . . . inferred a parallel damages action against federal officers").

among other things, that the postal inspectors launched a criminal investigation against him well before they had any inkling of either of the two schemes mentioned above, that the inspectors targeted him for his lobbying activities, and that they pressured the United States Attorney's Office to have him indicted. Moore also sought recovery from the United States under the Federal Tort Claims Act (FTCA). The District Court dismissed the claims against the Assistant United States Attorney in accordance with the absolute immunity for prosecutorial judgment, and rejected an abuse-of-process claim against the inspectors. *Moore* v. *Valder*, Civil Action No. 3:91–CV–2491–G (ND Tex., Sept. 21, 1992).[3]

The claims remaining were transferred to the District Court for the District of Columbia, where Moore's suit was dismissed in its entirety, Civ. Nos. 92–2288 (NHJ), 93–0324 (NHJ), 1993 WL 405785 (Sept. 24, 1993), only to have the Court of Appeals for the District of Columbia Circuit reinstate the retaliatory-prosecution claim. *Moore* v. *Valder*, 65 F. 3d 189 (1995). The District Court then permitted limited discovery on that matter so far as the inspectors were involved, but again dismissed the remaining charges against the United States and the prosecutor. *Moore* v. *Valder*, Civil Action No. 92–2288 (NHJ) et al., Record, Tab No. 32 (Memorandum Opinion, Feb. 5, 1998). Although Moore succeeded in having the District of Columbia Circuit reinstate his FTCA claim against the United States, the dismissal of his claims against the prosecutor was affirmed. *Moore* v. *United States*, 213 F. 3d 705 (2000).

With the remainder of the case back in District Court, the inspectors moved for summary judgment, urging that because the underlying criminal charges were supported

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[3]Moore and his wife had originally filed this complaint jointly. Her claims were dismissed for lack of standing.

by probable cause they were entitled to qualified immunity from a retaliatory-prosecution suit. The District Court denied the motion, and the Court of Appeals affirmed. 388 F. 3d 871 (2004).

The Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U. S. C. §1983 and *Bivens* retaliatory-prosecution suits. Some Circuits burden plaintiffs with the obligation to show its absence. See, *e.g.*, *Wood* v. *Kesler*, 323 F. 3d 872, 883 (CA11 2003); *Keenan* v. *Tejeda*, 290 F. 3d 252, 260 (CA5 2002); *Mozzochi* v. *Borden*, 959 F. 2d 1174, 1179–1180 (CA2 1992). Others, including the District of Columbia Circuit, impose no such requirement. See, *e.g.*, *Poole* v. *County of Otero*, 271 F. 3d 955, 961 (CA10 2001); *Haynesworth* v. *Miller*, 820 F. 2d 1245, 1256–1257 (CADC 1987). We granted certiorari, 545 U. S. ___ (2005), to resolve the Circuit split and now reverse.

II

Official reprisal for protected speech "offends the Constitution [because] it threatens to inhibit exercise of the protected right," *Crawford-El* v. *Britton*, 523 U. S. 574, 588, n. 10 (1998), and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out, *id.*, at 592; see also *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972) (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech"). Some official actions adverse to such a speaker might well be unexceptionable if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution. See *Crawford-El*, *supra*, at 593; *Mt. Healthy*

City Bd. of Ed. v. *Doyle*, 429 U. S. 274, 283–284 (1977) (adverse action against government employee cannot be taken if it is in response to the employee's "exercise of constitutionally protected First Amendment freedoms"). When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*. See 403 U. S., at 397.

III

Despite a procedural history portending another *Jarndyce* v. *Jarndyce*,[4] the issue before us is straightforward: whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges.[5]

A

The inspectors argue on two fronts that absence of

[4] See 2 C. Dickens, Bleak House 85 (1853).

[5] Moore contends that we (like the Court of Appeals before us) exceed our appellate jurisdiction when we address the issue of probable cause, see Brief for Respondent 37–39, but his argument is mistaken. It is true that the disagreement over a no-probable-cause requirement arose on the inspectors' motion for summary judgment on their qualified-immunity defense; Moore stresses that an interlocutory appeal can be taken from the rejection of qualified immunity at the summary-judgment stage only on questions turning on the definition of the violation, not on the sufficiency of the evidence to show that a defendant is in fact entitled to the immunity claimed. See *Mitchell* v. *Forsyth*, 472 U. S. 511, 528 (1985). Moore says that the issue of probable cause or its absence is simply an evidentiary matter going to entitlement in fact. But the inspectors are making more than a claim about the evidence in this case: they are arguing that we should hold that a showing of no probable cause is an element of the kind of claim Moore is making against them. In agreeing with the inspectors, we are addressing a requirement of causation, which Moore must plead and prove in order to win, and our holding does not go beyond a definition of an element of the tort, directly implicated by the defense of qualified immunity and properly before us on interlocutory appeal. See *ibid.*; see also *Crawford-El* v. *Britton*, 523 U. S. 574, 588, 592–593 (1998); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 285–286 (1977).

probable cause should be an essential element. Without such a requirement, they first say, the *Bivens* claim is too readily available. A plaintiff can afflict a public officer with disruption and expense by alleging nothing more, in practical terms, than action with a retaliatory animus, a subjective condition too easy to claim and too hard to defend against. Brief for Petitioners 21–23; see also *National Archives and Records Admin.* v. *Favish*, 541 U. S. 157, 175 (2004) (allegations of government misconduct are "'easy to allege and hard to disprove'"). In the inspectors' view, some "objective" burden must be imposed on these plaintiffs, simply to filter out the frivolous. The second argument complements the first, for the inspectors believe that the traditional tort of malicious prosecution tells us what the objective requirement should be. Brief for Petitioners 24–29. In an action for malicious prosecution after an acquittal, a plaintiff must show that the criminal action was begun without probable cause for charging the crime in the first place; the inspectors see retaliatory prosecution under *Bivens* as a close cousin of malicious prosecution under common law, making the latter's no-probable-cause requirement a natural feature of the constitutional tort. See *Heck* v. *Humphrey*, 512 U. S. 477, 483–485, and 484, n. 4 (1994).

B

In fact, we think there is a fair argument for what the inspectors call an "objective" fact requirement in this type of case, but the nub of that argument differs from the two they set out, which we will deal with only briefly. As for the invitation to rely on common-law parallels, we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations, see *Carey* v. *Piphus*, 435 U. S. 247, 258 (1978), but the common law is best understood here more as a source of inspired examples than of prefabricated

components of *Bivens* torts. See, *e.g.*, *Albright* v. *Oliver*, 510 U. S. 266, 277, n. 1 (1994) (GINSBURG, J., concurring); *Bivens*, *supra*, at 394; cf. *Baker* v. *McCollan*, 443 U. S. 137, 146 (1979). And in this instance we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it). Compare *Heck*, 512 U. S., at 483–485, and 484, n. 4 with *id.*, at 493–496 (SOUTER, J., concurring in judgment).

Nor is there much leverage in the fear that without a filter to screen out claims federal prosecutors and federal courts will be unduly put upon by the volume of litigation. The basic concern is fair enough, but the slate is not blank. Over the past 25 years fewer than two dozen damages actions for retaliatory prosecution under *Bivens* or §1983 have come squarely before the Federal Courts of Appeals, and there is no disproportion of those cases in Circuits that do not require showing an absence of probable cause.[6]

C

It is, instead, the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, that provides the strongest justification for the no-probable-cause requirement espoused by the inspectors. Although a *Bivens* (or §1983) plaintiff must show a causal connection between a defendant's retaliatory animus and subsequent injury in any sort of retaliation action, see *Crawford-El*, 523 U. S., at 593; *Mt.*

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[6] In fact, many of the appellate challenges have been brought in the Second, Fifth, and Eleventh Circuits, all of which require plaintiffs to show an absence of probable cause. See, *e.g.*, *Izen* v. *Catalina*, 398 F. 3d 363 (CA5 2005) *(per curiam)*; *Wood* v. *Kesler*, 323 F. 3d 872 (CA11 2003); *Keenan* v. *Tejeda*, 290 F. 3d 252 (CA5 2002); *Singer* v. *Fulton County Sheriff*, 63 F. 3d 110 (CA2 1995); *Post* v. *Fort Lauderdale*, 7 F. 3d 1552 (CA11 1993); *Mozzochi* v. *Borden*, 959 F. 2d 1174 (CA2 1992); *Magnotti* v. *Kuntz*, 918 F. 2d 364 (CA2 1990).

Healthy, 429 U. S., at 285–287, the need to demonstrate causation in the retaliatory-prosecution context presents an additional difficulty that can be understood by comparing the requisite causation in ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action, with causation in a case like this one.

Take the example of a public employee's claim that he was fired for speech criticizing the government. See, *e.g.*, *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 566–567 (1968) (allegation that a school board dismissed a teacher for writing a public letter critical of the board's financial administration). While the employee plaintiff obviously must plead and prove adverse official action in retaliation for making the statements, our discussions of the elements of the constitutional tort do not specify any necessary details about proof of a connection between the retaliatory animus and the discharge, which will depend on the circumstances. Cf. *Crawford-El*, *supra*, at 593 ("[A]t least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation"). The cases have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other. See, *e.g.*, *Mt. Healthy*, *supra*, at 287; see also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270, n. 21 (1977). It is clear, moreover, that the causation is understood to be but-for causation, without which the adverse action would not have been taken; we say that upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee). See *Mt. Healthy*, 429 U. S., at 287. If there is a finding that retaliation was not the